to the language of that section, is a discretion which seems to be as unfettered as any discretion can be. In my judgment the words "the court may, if it thinks fit" enable a judge, viewing the matter broadly and if in his opinion the circumstances warrant it, to exercise the discretion given to him to award interest on the damages.

It seems to me undesirable having regard to this unfettered discretion to attempt to enumerate under what circumstances and what are the elements which ought to be present before interest should be awarded. It seems to me also quite wrong to attempt to lay down the principles which should be acted on by a judge when considering a claim for an award of interest under section 8 of the Civil Law Ordinance as that would amount to an attempt to impose a fetter on what I consider to be an unfettered discretion which a judge has under that section.

Taking the circumstances as I find them in this case and viewing the matter broadly, I do not propose to exercise my discretion to award interest on the whole or any part of the agreed damages.

There will, therefore, be judgment for the plaintiff for $5,469 damages and costs.

Judgment for the plaintiff.

Solicitors: *Murphy & Dunbar; M. P. D. Nair.*

RE BALASINGAM & PARAVATHY, INFANTS KANNAMAH v. PALANI

[O.C.J. (Raja Azlan Shah J.) March 19, 1970]

[Kuala Lumpur — Originating Summons No. 248 of 1969]

Infants — Meaning of — Guardianship of Infants Act, 1961 — Whether it applies to illegitimate children.

Infants — Custody — Illegitimate children — Application by unmarried mother for custody order — Whether High Court has jurisdiction to entertain application — Guardianship of Infants Act, 1961.

Civil Law Ordinance, 1956, s. 27 — Custody and control of infant — Applicability of English law.

In this case the applicant applied under the Guardianship of Infants Act, 1961 for custody of her two infant children. There was a dispute as to whether she was legally married to the respondent but for the purpose of this case, it was assumed that there was no valid marriage. The question before the court was whether the High Court has jurisdiction to entertain an application by the *de facto* mother for a custody order under the Guardianship of Infants Act, 1961.

Held, dismissing the application: (1) "infant" means legitimate infant unless there is some repugnancy or inconsistency and not merely some violation of a moral obligation or of a probable intention resulting from so interpreting the word. Accordingly, since none of the words "father", "mother" or "infant" appearing in sections 5 and 6 of the Act can be construed to mean illegitimate infant or the *de facto* parents of illegitimate children, it must be concluded that the Act does not apply to illegitimate children and therefore this court has no jurisdiction to make the order sought. However the applicant has a remedy, as she can still institute wardship proceedings;

(2) English law is applicable to cases relating to custody and control of children but regard is to be had to the religion and customs of the parties.

Cases referred to:-

(1) *Re Miskin Rowter* [1963] M.L.J. 341.

(2) *In re C.T. (an infant)* [1957] Ch. 48.

(3) *In Re A.* (1940) 164 L.T. 230.

(4) *Galloway* v. *Galloway* [1955] 3 All E.R. 429.

(5) *Ponniah Pillai* v. *Senthamarai* [1954] M.L.J. 175.

ORIGINATING SUMMONS.

M. Mahalingam for the applicant.

G. Vadiveloo for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah J.: In this case, the applicant applies for custody of her two infant children. There is dispute as to whether she is legally married to the respondent but for the purposes of this case, it will be assumed that there was no valid marriage. The question to be settled before the court can go into the merits of the case is whether this court has jurisdiction to entertain an application by the *de facto* mother for a custody order under the Guardianship of Infants Act, 1961.

Counsel for the applicant contends that the court has been granted original jurisdiction under section 24(d) and (e) of the Courts of Judicature Act, 1964 in addition to the Guardianship of Infants Act, 1961. Section 24 of the Courts of Judicature Act, 1964 states:

"Without prejudice to the generality of the provisions of the last preceding section, the civil jurisdiction of every High Court shall include:—

(d) jurisdiction to appoint and control guardians of infants and generally over the person and property of infants;

(e) jurisdiction to appoint and control guardians and keepers of the persons and estates of idiots, mentally disordered persons and persons of unsound mind."

He argued that under English law, there is no corresponding section to our section 24 of the Courts of Judicature Act, 1964. The case of *Re Miskin Rowter*[1] was cited in which the guardianship of an illegitimate child was given to the natural mother.

Counsel for the respondent contended that it cannot be said that the Parliament did not have illegitimate children in contemplation when drafting the Guardianship of Infants Act, 1961 because section 1(2)(a) specifically mentions illegitimate children and which states as follows:

"Nothing in this Act shall apply in any State to persons professing the Muslim religion until this Act has been adopted by a law made by the Legislature of that State; and any such law may provide that —

(a) nothing in this Act which is contrary to the Muslim religion or the custom of the Malays shall apply to any person under the age of eighteen years who professes the Muslim religion and whose father professes or professed at the date of his death that religion or, in the case of an illegitimate child, whose mother so professes or professed that religion;"

He further argued that if "mother" in section 6 of the same Act is given a wider interpretation to mean *de facto* mother, then "father" in section 5 would also include a putative father. Question may arise as to who the putative father is so that the sections cannot refer to the putative father and mother and accordingly, mother must mean legal mother and father must mean legal father.

In determining the issue before this court, the first question that arises is whether English law on this subject is applicable which must then be followed by a consideration of how far this English law, if applicable, has been eroded by the Guardianship of Infants Act, 1961, other legislation and local case law.

Section 27 of the Civil Law Ordinance, 1956 reads:

"In all cases relating to the custody and control of infants, the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Ordinance, regard being had to the religion and customs of the parties concerned; unless other provision is or shall be made by any written law."

What then was the law of England on this date? By the Guardianship of Infants Acts, 1886 and 1925, the court may, upon the application of the mother as, of the father, make such order as it thinks fit with regard to the custody of the infant and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents and to the wishes of the mother as well as those of the father, the welfare of the infant as the first and paramount consideration.

The case of *In re C.T. (an infant)*[2] is of help in determining whether the court of England in 1956 had jurisdiction to entertain custody proceedings by *de facto* parents of illegitimate children. It was there held that the court had no jurisdiction to make an order granting custody of two illegitimate children to the putative father. The court considered in great length the meanings to be given to the words "father" and "mother" used in the Guardianship Acts of 1886 and 1925 and came to the conclusion that *prima facie*, the titles of "mother" and "father" belonged only to those who had become so in the manner known to and approved by the law, and that the meaning of such terms in a statute was not to be departed from unless a compelling reason could be found in the statute for so doing. Since no compelling reason can be found anywhere in the Act of 1886 (as amended) for extending the term "father" from a *de jure* to a putative one, this word must be construed as meaning legitimate father and did not extend to a putative one. There is a compelling reason in the case of the mother in one particular regard as has been held in the case of *In Re A.*,[3] that the title of "mother" in section 5(2) of the Guardianship Act, 1925, does include an unmarried mother. The reason is that by the Act of 1925, the mother of an infant may by deed or will appoint any person to be guardian of the infant after her death. By Part II, where an infant is illegitimate and the mother is dead, the person whose consent to marriage is required is the guardian appointed by the mother, and this fact implies that she has power to appoint a guardian to an illegitimate infant. Other than this particular instance, there is no compelling reason to extend the meaning of "mother" to that of a *de facto* one.

It is therefore quite settled that the law of England in 1956 was that neither the putative father nor the *de facto* mother of an illegitimate infant can make an application to the court for an order of custody.

The issue now arises as to whether this law is still applicable here or whether it has been modified by local legislation or case law.

The Guardianship of Infants Act, 1961 does not seem to provide for illegitimate children. The remarkable absence of any reference to illegitimate children other than in the abovementioned section 1(2)(a), would seem to favour the proposition that Parliament intended the Act not to apply to illegitimate children. This proposition is fortified by respondent's arguments on the correct construction of the words "father" and "mother" in sections 5 and 6. Furthermore, adopting the approach taken by Viscount Simonds in *Galloway* v. *Galloway*[4] it is safer to say that "infant" means legitimate infant unless there is some repugnancy or inconsistency and not merely some violation of a moral obligation or of a probable intention resulting from so interpreting the word. Accordingly, since none of the words "father", "mother" or "infant" can be construed to mean illegitimate infant or the *de facto* parents of illegitimate children, it must be concluded that the Act does not apply to illegitimate children.

Section 24(d) and (e) of the Courts of Judicature Act 1964 and Order 55A of the Rules of Supreme Court are only meant to confer jurisdiction on the High Court to entertain proceedings under the Guardianship of Infants Act. If illegitimate children are not within the ambit of the Act, how can it be said that jurisdiction has been conferred by the Courts of Judicature Act and the Supreme Court Rules on the High Court to entertain applications for the custody of illegitimate children brought under the Guardianship of Infants Act? The provisions of the Courts of Judicature Act, 1964, are based on existing legislation except in so far as they are consequential to the Malaysia Act. Therefore, whatever jurisdiction the High Court has in respect of custody proceedings can only be such as to entertain proceedings which are in accordance with the Guardianship of Infants Act, 1961. The High Court has no jurisdiction to entertain custody proceedings which cannot be brought under the Guardianship of Infants Act of 1961.

There are only two local cases on this point. The latest one is the case of *Re Miskin Rowter*[1] which is no authority for either side since the question of jurisdiction was not raised at all; the court proceeded on the assumption that it had jurisdiction. In the case of *Ponniah Pillai* v. *Senthamarai*[5] the putative father unsuccessfully applied for custody of his infant children. It was held that under section 6(1) of the Civil Law Enactment (now section 27 of the Civil Law Ordinance, 1956), English law is applied to cases relating to custody and control of children but regard is to be had to the religion and customs of the parties.

It would thus seem that neither local legislation or case law has altered the common law position on this point. The net result is that this court has no jurisdiction to entertain this application for custody by the *de facto* mother. However, it is not correct to say that as a result, the applicant has no remedy. She

can still institute wardship proceedings. The application is dismissed with costs.

Application dismissed.

Solicitors: *Mahalingam & Co.; D. P. Xavier & Co.*

SEBASTIAN v. PUBLIC PROSECUTOR

[A.Cr.J. (Winslow J.) April 7, 1970]

[Singapore — Magistrate's Appeal No. 206 of 1969]

Criminal Law and Procedure — Witness — Refreshing memory from previous statement to police — Witness an accomplice — Evidence of witness not properly evaluated — Criminal Procedure Code (Cap. 132), s. 121.

Penal Code, s. 363 — Kidnapping — Charge of.

Evidence — Witness — Accomplice — Witness refreshing memory from previous statement to police — Evidence of witness not properly evaluated.

The appellant had been convicted on a charge of kidnapping. The principal evidence against him was that of an accomplice who had been convicted and sentenced for the same offence. It appeared that this witness had his memory refreshed from his statement to the police a few days before he gave evidence. The only evidence connecting the appellant was the evidence by the accomplice that he had made a telephone call to the school where the kidnapped boy was studying.

Held, allowing the appeal: in this case the court was not satisfied that the district judge had applied the correct test in evaluating the evidence. One was not sure whether the accomplice was giving evidence of what he had previously said or whether he was giving evidence of what he actually recollected. The evidence of the accomplice was far from satisfactory and the appellant should not have been called on to enter upon his defence.

Cases referred to:-

(1) *Lau Pak Ngam* v. *The Queen* [1966] H.K.L.R. 246; [1966] Crim. L.R. 443.

(2) *Kanbi Vaghji Savji* v. *State of Gujarat* [1968] Crim. L.J. 54.

MAGISTRATE'S CRIMINAL APPEAL.

Dato' David Marshall for the appellant.

Chia Quee Khee (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Winslow J.: The appellant was charged in the fourth Criminal District Court on 19th August, 1969 as follows: —

"You, Sebastian s/o Anthony Samy are charged that you, on or about the 24th day of January, 1969, at about 11.00 a.m. at the Nanyang Kindergarten, King's Road, Singapore, did kidnap one Leonard Thean See Yin, aged four years, a male minor under fourteen years of age, from the lawful guardianship of Dr. Thean Lip Hing, the father of the said minor, without the consent of such guardian, and you have thereby committed an offence punishable under section 363 of the Penal Code, Cap. 119".

Mr. David Marshall, counsel for the appellant, based his argument for quashing the appellant's conviction, first, on the ground that that court lacked jurisdiction to try this offence in the absence of a prior application by the Public Prosecutor and the consent of the appellant and, secondly, on the ground that the charge was defective in that particulars of the manner of the alleged kidnapping were not set out therein. He, however, mainly relied on two other grounds viz., that, as the principal witness for the prosecution was an accomplice who had already been convicted and sentenced to imprisonment for the same offence, the district judge had failed to recognise that this accomplice, in so far as he implicated the appellant had had his memory refreshed from his statement to the police a few days before he gave evidence, and that finally, the appeal should be allowed on the merits alone, particularly as some of the acts of the appellant deposed to by this accomplice were equally consistent with the appellant's innocence.

I accordingly propose to examine these latter submissions first in order to determine whether they are well-founded, pausing however to observe that the charge preferred against the appellant is defective in another respect, *viz.*, in that it does not state that the offence in question was committed by the appellant together with the accomplice with a common intention which was exactly what the prosecution set out to try and prove.

The learned deputy public prosecutor on the authority of *Lau Pak Ngam* v. *The Queen*[1] submitted that there was no rule that a witness should not refresh his memory from his former statement to the police. That case decided further, however, that anything in the nature of coaching would be reprehensible. Mr. Marshall on the other hand referred to an Indian case (*Kanbi Vaghji Savji* v. *State of Gujarat*[2]) which held that the value to be attached to the evidence of such a witness would depend on the circumstances of the particular case, since there was a likelihood that the witness would depose to what was contained in his previous statement rather than to what he actually recollected about what he had previously said. I would add, with respect, that another danger is, as adverted to in the Hong Kong case cited earlier, that a witness, who has refreshed his memory from his previous statement, might feel obliged to adhere to his previous statement even if he no longer believed it to be true. I might observe, however, that the Indian authorities cited by Mr. Marshall are based on section 162 of the Indian Criminal Procedure Code which differs from our section 121.

In the current appeal it was all the more important that the district judge should have scrutinised the evidence of P.W.9, Lee Kee Fatt, with even greater care than usual because, not only had he had his memory refreshed from his previous statement, parts of which "may have been" read out to him over and over again (according to the officer conducting the investigation), but he was also clearly an accomplice and the principal witness on whom the prosecution rested all their hopes for a conviction of the appellant.

He had had his memory refreshed in the manner I have just referred to. He was also a witness who, in the course of his evidence, tended to minimise the extent of the appellant's participation in the offence by stating that on the day of the kidnapping he did